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No. 96-243

# In the Supreme Court of the United States

OCTOBER TERM, 1996

BERNADINE SUITUM, PETITIONER

*v.*

TAHOE REGIONAL PLANNING AGENCY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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33 pp

## QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner's Fifth Amendment "takings" challenge to certain land-use restrictions is ripe for adjudication.

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**BRIEF FOR THE**
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## INTEREST OF THE UNITED STATES

This case involves a claim that the development restrictions imposed by the Tahoe Regional Planning Agency (TRPA) on a particular parcel in a subdivision on the Nevada shore of Lake Tahoe resulted in a "taking" of property within the meaning of the Fifth Amendment. Numerous federal statutes and regulations also involve restrictions on the permissible uses of real property associated with environmentally sensitive areas. See, *e.g.*, 33 U.S.C. 1251 *et seq.* (Clean Water Act of 1977); 16 U.S.C. 1531 *et seq.* (Endangered Species Act of 1973); 30 U.S.C. 1201 *et seq.* (Surface Mining Control and Reclamation Act of 1977 (SMCRA)). Many of those regulatory frameworks include administrative procedures through which property

owners may seek exemption from, or modification of, applicable restrictions, and some provide for the transfer of development rights in order to mitigate the adverse effect of land-use controls, see, *e.g.*, 30 U.S.C. 1260(b)(5) (authorizing Secretary of the Interior to exchange federal coal deposits for deposits covered by SMCRA's prohibition on mining within or adjacent to alluvial valley floors). The United States therefore has an interest in the proper application of both the Takings Clause of the Fifth Amendment and the ripeness doctrine.

In addition, respondent in this case, the TRPA, was created by an interstate compact between California and Nevada that was approved by Congress "in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake." Act of Dec. 18, 1969, Pub. L. No. 91-148, § 1, 83 Stat. 360; Act of Dec. 19, 1980, Pub. L. No. 96-551, § 1, 94 Stat. 3233. Under the compact, the TRPA is empowered "to establish environmental threshold carrying capacities and to adopt and enforce a regional plan and implementing ordinances which will achieve and maintain such capacities while providing opportunities for orderly growth and development consistent with such capacities." Pub. L. No. 96-551, § 1, Art. I(b), 94 Stat. 3234.

Under the Santini-Burton Act, Pub. L. No. 96-586, 94 Stat. 3381, the United States Forest Service is authorized to acquire lands and interests in lands in the Lake Tahoe Basin that are "environmentally sensitive." § 3(a)(1), 94 Stat. 3383. As of February 10, 1994, the Forest Service had acquired 3378 parcels (totalling approximately 11,000 acres) in the Basin, under the authority of the Santini-Burton Act. See General Accounting Office, *Report, Forest Service: Land Acquisitions Within the Lake Tahoe Basin* 2 (Oct. 1994). The Forest Service has acquired parcels in the subdivision in which petitioner's lot is located,



and in 1990 offered to purchase petitioner's lot (an offer which has lapsed).

## STATEMENT

1. Lake Tahoe, which straddles the California-Nevada border, is renowned for its scenic beauty and the extraordinary clarity of its water. Those qualities are both ecologically and economically important to the region, and are threatened by development in the surrounding basin. See *Kelly* v. *Tahoe Regional Planning Agency*, 855 P.2d 1027, 1028-1029 (Nev. 1993), cert. denied, 510 U.S. 1041 (1994). In 1969, California and Nevada entered into the first Tahoe Regional Planning Compact in an effort to direct development in the Basin in such a manner as to protect and preserve the lake. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 393-394 (1979). The compact included findings that "the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region," and that "the region is experiencing problems of resource use and deficiencies of environmental control." Pub. L. No. 91-148, § 1, Art. I(a) and (b), 83 Stat. 360. In order to address those problems, the compact created the Tahoe Regional Planning Agency (TRPA), "an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development." Art. I(c), 83 Stat. 361. The TRPA was empowered to "adopt all necessary ordinances, rules, regulations and policies to effectuate" the Regional Plan. Art. VI(a), 83 Stat. 366.

The protections established under the 1969 compact proved insufficient to control the threat to the lake and its environs, and in 1980, a new compact was approved by Congress. The 1980 compact included the findings that

"[t]he region exhibits unique environmental and ecological values which are irreplaceable," and that "[i]ncreasing urbanization is threatening the ecological values of the region." Pub. L. No. 96-551, § 1, Art. I(a)(3) and (5), 94 Stat. 3233. The compact vested the TRPA with new authority to establish "environmental threshold carrying capacities"[1] and to adopt and enforce a regional plan and implementing regulations to achieve and maintain such capacities. Arts. I(b), V(b), 94 Stat. 3234, 3239.

In 1987, the TRPA adopted a new, comprehensive Regional Plan for implementing the 1980 compact. See *Kelly*, 855 P.2d at 1030-1031. The 1987 Regional Plan created the Individual Parcel Evaluation System (IPES), under which all undeveloped residential lots are evaluated and scored for their suitability for development. For each county in the Basin, the TRPA establishes annually a minimum score for eligibility for building. In 1989, the TRPA established an initial minimum IPES score of 725 to qualify for development. Properties with lower scores could not be developed. The minimum score is subject to revision, based in part on the particular county's efforts and success in achieving improvements to water quality in the Basin. See *ibid.*

The Regional Plan also identified Stream Environment Zones (SEZs) in the Basin, which are areas surrounding streams that carry run-off in the watershed into Lake Tahoe. A SEZ performs the critical environmental function of absorbing nutrients and cleansing the run-off, thereby maintaining the clarity of the lake. J.A. 22, 25.

[1] An "environmental threshold carrying capacity" is an "environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region." Art. II(i), 94 Stat. 3235. See *California* v. *Tahoe Regional Planning Agency*, 766 F.2d 1308, 1310 (9th Cir. 1985).



Because of the acute environmental sensitivity of such areas, the 1987 Regional Plan does not permit development in a SEZ that would result in permanent land disturbance or in covering the land with an impermeable surface. Parcels located in a SEZ therefore receive an IPES score of zero; with certain exceptions not relevant here, no construction can take place on such parcels. J.A. 26, 29, 62-68, 83, 87, 157-158.

The program imposed by the 1987 Regional Plan mitigates the effect of development restrictions on individual property owners by vesting in those owners certain transferable development rights (TDRs) that may be conveyed to owners of other eligible parcels. See J.A. 69-75. The Regional Plan recognizes three independent types of TDRs. A "residential development right" represents the right to have a residential unit on an eligible parcel of land. A "residential allocation" is necessary to construct a residence in a specific calendar year. "Land coverage" represents the right to utilize impervious coverage of land surface on one's parcel. J.A. 96-99. Each private owner of a vacant residential parcel automatically receives one residential development right, J.A. 97, whereas an owner's residential allocation and land coverage rights are determined through the TRPA's individual assessment of the parcel's suitability for development, J.A. 45, 70.

Owners of SEZ property receive both the standard allotment of TDRs and additional transferable property rights. In addition to the one residential development right that all private owners of vacant residential property possess, owners of SEZ property may earn and transfer up to three additional residential development units. J.A. 98. The owners of SEZ property also receive land coverage rights equal to 1% of the surface area of their land. J.A. 45, 62, 65. Finally, SEZ owners may apply for a residential allocation in any particular year and, if awarded an

allocation,[2] may transfer it for application to an eligible property in the Basin. J.A. 98-99, 146-148. While owners of SEZ property may not use their TDRs to develop the SEZ parcel itself, they may transfer those rights for use on any eligible property in the Lake Tahoe Region.[3] All such transfers must be approved by the TRPA, which reviews the eligibility of the receiving parcel under the development restrictions applicable to that parcel. J.A. 107-108.

2. In 1972, petitioner purchased a vacant lot in the Mill Creek Estates subdivision of Incline Village, located in Washoe County, Nevada. Her purchase occurred after the first Tahoe Regional Planning Compact was approved in 1969. Petitioner did not attempt to develop the property until 1989, after the adoption of the 1987 Regional Plan. At that time, petitioner entered the Washoe County drawing for a residential allocation and was awarded an allocation for that year. She then submitted building plans to the TRPA, seeking permission to construct a house on the lot. The TRPA denied permission to build because the lot was in a SEZ for Mill Creek, which flows into Lake Tahoe. The TRPA verified the status of the property by a field visit and confirmed that the property's IPES score was zero because of its location in a SEZ. Petitioner appealed the permit denial to the governing board of the TRPA, which denied the appeal on November 27, 1990. J.A. 14-15, 86-87, 158-159.

It is undisputed that, although petitioner could not build a house on her parcel, she was entitled under the 1987

[2] Residential allocations are awarded by local jurisdictions in random drawings. J.A. 99.

[3] Eligible property owners in the region who purchase such rights may then develop their parcels beyond the parcels' initial designations. For example, an individual who wishes to build more than one residential unit on his or her property would have to acquire additional residential development rights from other owners. J.A. 69-70, 158.



Regional Plan to transfer her residential development right and the right to cover 1% of her land (183 square feet) to other eligible properties. In addition, she was entitled to obtain and then transfer three bonus residential rights. Finally, although her 1989 residential allocation expired at the end of that year, she was entitled to enter the drawing again and, if successful, transfer that allocation. Petitioner did not again apply for a residential allocation, nor did she attempt to locate a buyer for her transferable development rights. J.A. 87, 158-159.

3. a. On January 28, 1991, petitioner initiated this action in the United States District Court for the District of Nevada against the TRPA, the States of California and Nevada, and Washoe County under 42 U.S.C. 1983.[4] She alleged that the restrictions enforced by the TRPA "de-n[ied] [her] the right to construct a home on the Subject Lot, thereby depriving her of all reasonable and economically viable use of the Subject Lot." J.A. 15 (¶ 6). She contended, *inter alia*, that the TRPA's actions constituted a taking of her property, in violation of the Fifth and Fourteenth Amendments. J.A. 16 (¶¶ 14, 16).

In its answer, the TRPA specifically denied petitioner's allegation that the challenged regulatory framework had deprived her property of all reasonable and economically viable use. J.A. 8. As an affirmative defense, the TRPA alleged, among other things, that "[petitioner's] complaint as to [the TRPA] is not ripe, and [the district court] thus lacks jurisdiction, because of [petitioner's] failure to obtain a final decision by TRPA as to the amount of development or other uses of [petitioner's] property that may be allowed by the Tahoe Regional Planning Compact and TRPA's Regional Plan and Ordinances." J.A. 10 (¶ 23).

[4] The complaint was subsequently dismissed as to all defendants except the TRPA. See District Court Docket Entry #24.

See also J.A. 11 (¶ 30) ("Each claim for relief of [petitioner's] complaint fails to present a concrete controversy ripe for adjudication.").

b. The parties filed cross-motions for summary judgment. With respect to petitioner's "takings" claim, the TRPA contended in support of its motion that petitioner's claim was not ripe for adjudication because petitioner "ha[d] failed to pursue transfer of development, a remedy geared *precisely* to those in her situation." TRPA's Memorandum of Points and Authorities in Support of Motion for Summary Judgment 19. Petitioner opposed the TRPA's motion on the ground that, having unsuccessfully appealed the TRPA's denial of her request to build, she "need do no more" in order to advance a ripe takings claim. Suitum's Opposition to Defendant's Motion for Summary Judgment 6. In her cross-motion, petitioner contended that "the TRPA's actions preventing [her] from building amount to such a denial of economically viable use as to constitute a taking." Suitum's Reply to Opposition to Plaintiff's Cross-Motion for Summary Judgment 1.

c. On November 23, 1993, the district court concluded that it could not resolve the ripeness issue without more information regarding the nature of petitioner's transferable development rights, the process for transferring those rights, and the value of the rights. J.A. 88-89. The court accordingly ordered the parties to file supplemental briefs "explaining what development rights can be transferred in [petitioner's] case and the procedures, prerequisites and value of such transfer as applicable in this case." J.A. 89.

In response to the court's order, the TRPA contended that "[t]he *actual* benefits of the [TDR] program for [petitioner's] property * * * can only be known if she pursues an appropriate application," and that, "[a]s a result, there is a measure of inevitable speculation in the



information" that it had submitted. J.A. 91. Nonetheless, the TRPA's submission included affidavits indicating that petitioner's TDRs were marketable and would have significant financial value if she sought to transfer them. J.A. 96-132; see also J.A. 91-93 (summarizing affidavits submitted by the TRPA).

In her supplemental brief, petitioner contended that pursuing the transfer of her development rights would be an "idle and futile act" because, in her view, the TDR program is "a sham." Suitum's Response to Defendant's Memorandum Concerning Its Transfer of Development Program 1-2. In so contending, however, she appeared to agree with the TRPA that the practical application of the TDR program to her property was "inevitabl[y] speculati[ve]." *Id.* at 2. In light of that ambiguity, and the prohibition of any physical development of her parcel, she asserted that the challenged regulations had reduced the value of her property "not to zero, but to a negative number." *Ibid.*

Petitioner included in her submission the affidavit of Paul Kaleta, a former employee of the TRPA. Mr. Kaleta agreed with the TRPA's submission "as it concerns identifying the *potential* available development commodities on the above referenced property," but disagreed as to the value of those rights. J.A. 135 (¶ 2). Mr. Kaleta expressed the view that "there is little to no value to these rights at the present time as there is either no market for them or the procedure for transferring one particular right would restrict the opportunity to transfer a remaining right." *Ibid.* (¶ 3).

d. Upon consideration of the parties' submissions, the district court dismissed petitioner's claims for lack of subject-matter jurisdiction, finding that they were not yet ripe for adjudication. J.A. 150-153. The court held, as a preliminary matter, that the affidavit of Paul Kaleta

submitted by petitioner was inadequate under Federal Rule of Civil Procedure 56(e)[5] and would be disregarded. J.A. 151 n.2. The court concluded that Mr. Kaleta demonstrated no "knowledge, skill, experience, training or education which would qualify him to testify as an expert [under Federal Rule of Evidence 702] as to the valuation of [petitioner's] development rights." *Ibid.*

The court next concluded that "transfer rights are significant to the takings calculus," J.A. 152 (citing, *e.g.*, *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 137 (1978)), and that the TRPA's TDR program was designed to mitigate the adverse effect of development restrictions on owners of parcels within SEZs, *ibid.* The court further found that "specific examples of sales of rights in the past demonstrate[] [that] there is significant value in the transfer of residential development rights and transfer of residential allocations which [petitioner] may be entitled to." *Ibid.*

The court next observed that, "until values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent TRPA's regulations have frustrated [petitioner's] reasonable expectations." J.A. 153. Because it concluded that an application to transfer development rights "is the only 'meaningful application' that can be made once property is determined to be SEZ," J.A. 152, the court held that petitioner was required to apply to the TRPA for approval of the transfer of her TDRs before her claim would become ripe, *ibid.* The court found that prerequisite to be consistent with this Court's requirement that property owners obtain a "final decision" as to the permissible uses of their property before proceeding to court. *Ibid.* (citing *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 190-191 (1985); *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 348 (1986)).

[5] Rule 56(e) provides, in pertinent part:

> Supporting and opposition affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.



4. The court of appeals affirmed. J.A. 154-164. Observing that petitioner's takings claim is an "as applied" challenge (J.A. 159), the court held that, under the "final decision" requirement for ripeness set out in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, *supra*, petitioner was required to show that, before filing suit, she sought a "final decision from [the TRPA] regarding the application of the [challenged] regulation to the property at issue." J.A. 160 (citation omitted). Only in light of a final decision by the regulating authority, the court explained, may the economic impact of the challenged restrictions, and the extent to which they interfere with petitioner's investment-backed expectations, be judicially determined. J.A. 161.

The court rejected petitioner's claim that attempting to transfer her development rights would be futile because the TRPA's program was "a sham." J.A. 161. It held that the district court had not abused its discretion in rejecting Mr. Kaleta's affidavit, and affirmed the district court's finding that petitioner's "development rights possess some significant value." J.A. 163.

Finally, the court rejected petitioner's assertion that she need not pursue the transfer of her development rights because the TDR program was not designed to provide "just compensation." The court observed that regulatory requirements do not necessarily constitute a "taking" merely because their effect is to diminish the value of property. It held that, because application for approval of

the transfer of development rights under the instant program could "mitigate the regulations' economic effect and result in a diminution in value rather than a more severe economic impact," participation in that program was necessary to the consideration whether a taking had occurred at all. J.A. 163.

## SUMMARY OF ARGUMENT

I. Petitioner's central contention is that physical development of her property is the only "use" of that property that is relevant to the substantive "takings" analysis. That contention misapprehends this Court's takings jurisprudence, which, in turn, governs the proper application of ripeness principles to petitioner's claim. In *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), the Court expressly held that transferable development rights "undoubtedly mitigate whatever financial burdens the law has imposed on [property owners] and, for that reason, are to be taken into account in considering the impact of regulation." *Id.* at 137. Moreover, because the rights protected by the Takings Clause are primarily economic rights, petitioner's narrow focus on the physical development of her property is misplaced.

Contrary to petitioner's contention, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), supports the conclusion that the takings inquiry looks primarily to the economic impact of land-use regulations on the subject property. The outcome in *Lucas* turned on the lower courts' undisputed finding that the claimant's property had "been rendered valueless" by the challenged restriction. *Id.* at 1020. By contrast, the only admissible evidence in this case demonstrated that petitioner's property rights retain "significant value." J.A. 163.

II. Because transferable development rights (TDRs) are highly relevant to the substantive determination



whether a taking has occurred, property owners must obtain a final administrative determination as to the scope of those rights from the pertinent regulatory body before they can advance a ripe takings claim. Absent such a determination, courts cannot properly measure the economic impact of challenged land-use regulations, as this Court's takings decisions require. Petitioner appears to have satisfied the "final decision" requirement in this case by appealing the limitations on her parcel to the governing board of the TRPA. The scope of petitioner's TDRs was discernible under the 1987 Regional Plan as soon as her appeal of the TRPA's permit decision was denied.

Nonetheless, we believe that the procedural history and factual record in this case justified dismissal on prematurity grounds. The district court was faced with a circumstance in which both parties took the position that the value—as distinguished from the legal dimensions and permissible uses—of petitioner's TDRs was highly speculative in nature. Moreover, petitioner sought to challenge the bona fides of the TDR program without proffering any admissible proof and without taking any steps to market her transferable rights. Because of petitioner's total failure to substantiate her claim, the hardship of postponing decision apparently fell on respondent, which was urging lack of ripeness. In light of the unusual posture of the case, a finding of prematurity was justified under the prudential ripeness principles set out in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

## ARGUMENT

### I. PETITIONER'S PRINCIPAL RIPENESS CONTENTION IS PREMISED ON A FLAWED READING OF THIS COURT'S SUBSTANTIVE TAKINGS JURISPRUDENCE

Petitioner's principal contention is that physical development of her land is the only "use" of real property that is relevant to the determination whether a "taking" has occurred. In petitioner's view, the existence and value of transferable development rights are immaterial to the takings inquiry and, consequently, to the threshold question of ripeness. See, *e.g.*, Pet. Br. 13-15. That contention is directly contrary to this Court's decisions.

A. In *Penn Central Transportation. Co.* v. *City of New York*, 438 U.S. 104 (1978), property owners claimed that the New York City Landmarks Preservation Commission's refusal to allow them to construct a 50-story office tower over their existing structure (Grand Central Terminal) effected an uncompensated taking of their property. The regulatory framework at issue in that case imposed stringent restrictions on the subsequent development of properties designated as landmarks, but allowed affected owners to transfer certain development rights to other eligible parcels. *Id.* at 113-115.

The owners of the Terminal claimed, among other things, that the regulatory scheme had extinguished their "air rights" above the Terminal, and that that regulatory consequence constituted a taking of those rights. 438 U.S. at 136-137. In rejecting that contention, the Court made clear that transferable development rights constitute a "use" of property that is relevant to the takings analysis:

> [T]o the extent [that the owners of the Terminal] have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all use* of even those pre-existing air rights. Their ability to *use* these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable.



*Id.* at 137 (emphasis added in part; footnote omitted).

The Court in *Penn Central* also made clear that the existence and value of TDRs are primarily relevant to the question whether a taking has occurred at all, rather than merely to the question whether "just compensation" has been afforded. It explained that, "[w]hile these [transferable development] rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [the owners] and, for that reason, are to be taken into account in considering the impact of regulation." 438 U.S. at 137 (citing *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 n.3 (1962)). The Court then concluded that, on the record before it, "the application of New York City's Landmarks Law has not effected a 'taking' of [the Terminal owners'] property." *Id.* at 138.

*Penn Central* thus forecloses petitioner's argument that her TDRs—which the undisputed evidence demonstrated "possess some significant value" (J.A. 163)[6]—

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[6] Petitioner did not seek review by this Court of the court of appeals' upholding of the district court's ruling, pursuant to Federal Rule of Civil Procedure 56(e), that the affidavit of Mr. Kaleta, petitioner's putative expert, would not be considered. Accordingly, for

should not be considered in the determination whether the challenged regulatory restrictions effect a taking.[7] It is true that the overall impact of the challenged land-use restrictions in *Penn Central* may well have differed from that of the restrictions at issue here because more modest construction above the Terminal might have been possible, and because the landmark restrictions did not interfere with what the Court "regarded as [the property owners'] primary expectation concerning the use of the parcel"—its continuing use as a railroad terminal. 438 U.S. at 136. The possibility of such factual distinctions, however, suggests merely that the ultimate substantive determination whether the restrictions on petitioner's parcel constitute a taking would not squarely be controlled by *Penn Central*. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981) (takings inquiry "must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances"). Any such differences would not, however, distinguish *Penn*

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purposes of this Court's review, it is no longer contested that the operation of the TRPA's regulatory program leaves petitioner with real and substantial value as part of her ownership of the parcel.

[7] Indeed, the transferable rights at issue in this case are, in significant respects, more expansive than were those available to the Terminal owners in *Penn Central*. Compare *Penn Central*, 438 U.S. at 113-115, with J.A. 90-99, 144-149, 157-158. For example, the TDRs recognized in *Penn Central* could be transferred only to otherwise eligible properties across the street from the landmark parcel, across a street intersection, or "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections f[or]m a series extending to the lot occupied by the landmark building[, provided that] all lots [are] in the same ownership." 438 U.S. at 114. By contrast, the TDR program at issue here allows a transfer of rights to any otherwise eligible parcel within the Tahoe Basin and does not require coinciding ownership. J.A. 69-73.



*Central*'s unequivocal holding that the existence and value of transferable development rights "undoubtedly mitigate whatever financial burdens the law has imposed on [a property owner] and, for that reason, are to be taken into account in considering the impact of regulation." 438 U.S. at 137.

B. Indeed, the conclusion that TDRs are relevant to the takings analysis flows inevitably from the nature of that analysis. The determination whether a taking has occurred in a given case entails "ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action—that have particular significance." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 349 (1986) (quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979)); see also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 295. The value and nature of rights—including TDRs—that a property owner retains (or, as in this case, obtains) notwithstanding the regulation of his or her parcel are logically relevant to each of those factors. See, *e.g.*, *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property.") (quoting *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987)).

The Court's takings doctrine views an individual's interest in property as a "bundle of rights" that can be possessed, alienated, or regulated either as a whole or with respect to its constituent parts. See *Dolan* v. *City of Tigard*, 512 U.S. 374, 393 (1994) (characterizing right to exclude others from one's property as "one of the most essential sticks in the bundle of rights that are commonly

characterized as property") (quoting *Kaiser Aetna*, 444 U.S. at 176); see also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992); *Hodel* v. *Irving*, 481 U.S. 704, 716 (1987); *Keystone*, 480 U.S. at 497. The ability physically to develop real property typically is within that bundle and plainly is one important "use" of an owner's land. But the recognized bundle of rights associated with ownership embraces many other "uses," including the right to exclude others from the property, the right to exploit its resources, the right to lease it, and the right to dispose of it (or aspects of it) through devise, gift, or sale. The question whether regulation of certain "sticks" in the bundle constitutes a taking of the whole requires a comprehensive, fact-intensive inquiry that rarely turns on the treatment of a single attribute of ownership.[8] Petitioner's contention (Br. 11, 19-22) that physical "development" of a

[8] The Court has identified only two categories of regulation that constitute *per se* takings—*i.e.*, that are "compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. The first occurs where government action results in a permanent, physical occupation of property. *Ibid.*; see, *e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982). The second arises "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015 (citing, *e.g.*, *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 834 (1987)). Petitioner does not (nor could she) contend that a physical occupation of her land has occurred in this case. And, as we explain below, the undisputed evidence in the record refutes the proposition that the restrictions she challenges deny her all economically beneficial use of her property. Nor, under this Court's takings jurisprudence, can she "shoehorn" her claim into the latter category by dividing her parcel of property "into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Concrete Pipe*, 508 U.S. at 643-644. Yet that is precisely what petitioner's principal contention seeks to do in this case.



parcel is the sole or determinative factor in the takings inquiry is therefore erroneous.

Petitioner's narrow focus on physical development is unavailing for an additional reason. The right protected by the Fifth Amendment's Takings Clause is fundamentally an economic right. See *Lucas*, 505 U.S. at 1017 ("[F]or what is the land but the profits thereof[?]") (quoting 1 E. Coke, *Institutes*, ch. 1, § 1 (1st Am. ed. 1812)). The Clause does not prohibit all takings of property, but, rather, uncompensated takings. Thus, where there is no physical occupation of the owner's property,[9] the inquiry into whether a taking has occurred looks primarily to the challenged regulation's "*economic* impact" on the subject property, see, *e.g.*, *Kaiser Aetna*, 444 U.S. at 175; *Hodel* v. *Irving*, 481 U.S. at 714; *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986); *Keystone*, 480 U.S. at 495; *Concrete Pipe*, 508 U.S. at 645, not to whether an owner's preferred or most beneficial use has been hampered. *Penn Central*, 438 U.S. at 130 ("[T]he submission that [property owners] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."). Because the appropriate analysis turns on whether governmental restrictions "den[y] an owner *economically* viable use of his land," *Dolan*, 512 U.S. at 385 (quoting *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980)) (emphasis added), courts must consider all financially productive uses, including those that do not entail physical development of the property.

[9] The Court has held that "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 432.

Contrary to petitioner's contention (Br. 30-34), the Court's decision in *Lucas* strongly supports that conclusion. There, the Court found a *per se* taking to have occurred, based on the undisputed factual finding that the claimant's property "ha[d] been rendered valueless" by the challenged land-use restriction. 505 U.S. at 1020. The Court was therefore faced with "the relatively rare situation[] where the government has deprived a landowner of all *economically* beneficial uses" of his or her property. *Id.* at 1018 (emphasis added). The Court made clear, moreover, that it was the *economic* impact of the challenged restriction in that case that rendered it unconstitutional. See, *e.g.*, *id.* at 1019 ("[W]hen the owner of real property has been called upon to sacrifice *all economically* beneficial uses in the name of the common good, that is, to leave his property *economically* idle, he has suffered a taking.") (emphasis added in part); *id.* at 1016 ("[T]he Fifth Amendment is violated when land-use regulation '* * * denies an owner *economically* viable use of his land.'") (quoting *Agins*, 447 U.S. at 260) (emphasis omitted in part).

*Lucas* therefore reaffirms that the ability to construct a building on one's land is but one of several important interests that are relevant to the takings inquiry. The present case, moreover, stands in stark contrast to *Lucas* because, here, the only admissible evidence established that petitioner's TDRs do possess meaningful value. Far from being a "contriv[ance]" or evasion of the Fifth Amendment, Pet. Br. 30, the TRPA's TDR program seeks reasonably to balance the strong public interest in ecological preservation against the property rights of private owners.[10]

[10] Seen in this light, the district court's grant of summary judgment in this case, while expressed in ripeness terms, effectively rejected petitioner's contentions as without merit insofar as they rested on a rationale of facial or *per se* invalidity of the TRPA's TDR program. To the extent that petitioner and her supporting *amici* argue that this Court should adopt a similar rationale, those arguments are foreclosed by this Court's takings jurisprudence and, specifically, by its holding in *Penn Central*.

Indeed, on its face, the TRPA's program seems a commendable effort to preserve both ecological and economic values in this peculiar geographic area in a way that achieves both reciprocity of advantage and a sharing of the economic burden. In light of the findings supporting the 1980 compact that enabled the plan's adoption (see pp. 3-4, *supra*), it would be unrealistic to assume that property values in the Basin would remain undiminished if effective steps were not taken to prevent serious environmental degradation. By imposing somewhat greater restrictions on development of non-SEZ properties than might otherwise be required for the parcels in isolation, the plan creates valuable TDRs for owners of SEZ parcels whose own development would threaten the community's ecology and economy. And the plan's overall protection of the area's interdependent ecological and economic values also helps to preserve residual resale value in the SEZ parcels. See J.A. 152.

Moreover, this Court's takings jurisprudence recognizes "that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation." *Lucas*, 505 U.S. at 1022. The peculiar dangers that would be posed by further impervious coverage of SEZ parcels therefore is relevant to the takings calculus here, even though the TRPA has not found it necessary to contend here that the restrictions imposed on further development of SEZ parcels would be permissible even in the absence of the countervailing enhancements of value created by the TDR program.



## II. THE COURT OF APPEALS' RIPENESS DETERMINATION WAS PERMISSIBLE IN THE CIRCUMSTANCES OF THIS CASE IN LIGHT OF PRUDENTIAL RIPENESS CONSIDERATIONS

In light of the foregoing, petitioner errs in contending that the TDR program, and the transferable development

rights that she possesses, are irrelevant to the determination whether her takings claim was ripe. Under the terms of the 1987 Regional Plan, however, it appears that petitioner satisfied the requirement of a final administrative determination when she appealed administratively the TRPA's designation of her parcel and its denial of permission to construct a house on her lot. See J.A. 158. Nonetheless, we believe that the procedural history and factual record in this case justified dismissal of petitioner's takings claim.

A. 1. In *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), the Court held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. In so holding, the Court applied traditional rules of justiciability to the substantive claim at issue. See *id.* at 190 ("Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause."). Reiterating that the crux of the takings inquiry is the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations, the Court explained in *Williamson County* that "[t]hose factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191. The Court again applied the "final decision" requirement in *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340 (1986), explaining that "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.* at 348.



Because, as we have explained, the existence and value of transferable development rights are highly relevant to the substantive determination whether a taking has occurred, it follows *a fortiori* from *Williamson County* and *MacDonald, Sommer & Frates* that claimants must obtain a "final decision" regarding the scope of such rights from the pertinent regulatory body before a taking claim will be ripe for adjudication. "[A]gencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *MacDonald, Sommer & Frates*, 477 U.S. at 350. Absent a final determination with respect to the full "bundle of rights" that a property owner possesses, courts cannot properly apply the "careful assessment of the impact of the regulation" on the claimant's property rights, *Penn Central*, 438 U.S. at 136, that this Court's cases require.

2. The courts below reasoned that, "[w]ithout an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of [petitioner's] property." J.A. 160-161. See also J.A. 152 ("As things now stand, there is no final decision as to how [petitioner] will be allowed to use her property."). Under the 1987 Regional Plan, however, the existence and scope of petitioner's TDRs were readily discernible when her property was designated as within an SEZ. It is undisputed that, at that point, she was entitled to transfer her residential development right and 1% of her land coverage, and was entitled to obtain and then transfer up to three bonus residential rights. J.A. 158-159. Petitioner was further entitled to enter the drawing for a residential allocation and, if successful, transfer that allocation to an eligible parcel. J.A. 159. By appealing the TRPA's denial of her construction request, petitioner seems to have satisfied the requirement that the pertinent regulatory body

rule on the full extent of her development rights. The fact that petitioner has not yet *realized* the value of her TDRs—and that both sides view that value as "speculati[ve]," J.A. 91—does not mean that the legal scope of those rights has not been finally determined by the TRPA.

Petitioner thus has satisfied the "final decision" requirement, as applicable to the instant regulatory program. For the reasons set out below, however, we believe that the lower courts' finding of prematurity in this case is supported by prudential ripeness concerns.

B. This Court explained in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), that the ripeness of a claim turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. The "fitness" inquiry serves both constitutional and prudential concerns; it ensures that Article III's "Case or Controversy" requirement is satisfied by the temporal posture of the case, see *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974), and effectuates prudential concerns pertaining to judicial administration and resources, as well as the rule against "unnecessary decision of constitutional issues," *ibid.* The "hardship" inquiry is wholly prudential in nature, looking to the equitable factors weighing for and against adjudication of a claim at any given time. See L. Tribe, *American Constitutional Law* § 3-10, at 78 (2d ed. 1988).

In this case, petitioner's claim meets the requirements of Article III. She has demonstrated a current, personal injury that is "fairly traceable to [respondent's] allegedly unlawful conduct" and is "likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). By obtaining a "final decision" as to the scope of her TDRs, moreover, petitioner has ensured "that concrete adverseness" on which Article III justiciability depends. *Baker* v. *Carr*, 339 U.S. 186, 204 (1962).



It also appears, however, that "subsequent events may sharpen the controversy or remove the need for decision of at least some aspects of the matter." Tribe, *supra*, § 3-10, at 78. For example, if petitioner seeks and obtains a potential buyer for her TDRs at a substantial price, and if the TRPA approves the transfer of those rights to the buyer, petitioner's putative takings claim might abate entirely. Conversely, if petitioner is unable to locate a suitable buyer, or if the TRPA rejects petitioner's application to transfer her rights to a particular parcel, the courts may consider petitioner's claim in a far more concrete context than the one that presently exists.[11]

Ordinarily, the existence of such contingencies would not justify dismissal on prudential ripeness grounds where the "final decision" requirement is met.[12] The proper course would be for the district court to adjudicate the claim on the merits.[13] In this case, however, the

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[11] We do not mean to suggest that the value of conferring TDR rights under an overall system in which such rights are shown to have substantial market value can be negated by a particular owner by a showing that she experienced what may be aberrational marketing difficulties.

[12] The Court explained in *Abbott Laboratories* that the prudential ripeness doctrine arises from the discretionary nature of injunctive and declaratory judgment remedies. 387 U.S. at 148. Petitioner's complaint in this case seeks legal as well as equitable remedies. See J.A. 16-17. But because the courts below found that the regulatory regime on its face preserved significant economic value for the categories of TDRs petitioner possesses—and because her damages claim was wholly unsubstantiated by admissible evidence in this case—the mere assertion of the damages claim should not control the prudential ripeness calculus.

[13] In light of the substantive taking principles that we have described in point I, *supra*, petitioner necessarily would have lost on the merits of her takings claim, in light of her complete failure of proof, J.A. 151 n.2, and the undisputed evidence that her TDRs have signifi-

district court was faced with an unusual circumstance in which (1) both parties contended that the value of petitioner's property rights under the TDR program was "inevitabl[y] speculati[ve]", J.A. 91; Suitum's Response to Defendant's Memorandum Concerning Its Transfer of Development Program 2; (2) petitioner proffered no admissible evidence with respect to the overall economic impact of the challenged restriction on the value of her property rights, J.A. 151 n.2; and (3) petitioner had made no attempt to market her TDRs. In those circumstances—and in light of petitioner's litigating strategy of resting entirely on a broad-based attack on the bona fides of the TDR program that the courts below correctly rejected[14]—it was not error for the district court to conclude that the con-

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cant financial value, J.A. 91-93, 96-132. Thus, the "hardship" (see p. 24, *supra*) of postponing adjudication in this case appears to have fallen largely on respondent, which contended in the courts below that the claim was not yet ripe for adjudication.

[14] "[R]ipeness decisions * * * may be affected by the way in which a litigant attempts to articulate a claimed right. An articulation that seems conjectural and uncertain may defeat present decision where a different articulation might persuade the court of the need to decide." 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3532.3, at 166 (1996 Supp.).

Despite the vituperative nature of petitioner's challenge, see, *e.g.*, Suitum's Response to Defendant's Memorandum Concerning Its Transfer of Development Program 1-2, she does not purport to pursue a "facial" challenge to the "mere enactment," *Keystone*, 480 U.S. at 494; *Agins*, 447 U.S. at 260, of the 1987 Regional Plan. See Pet. Br. 4. But see note 10, *supra*. Such a challenge would be ripe in the circumstances of this case, see *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983), but would necessarily fail on the merits because the Regional Plan substantially advances legitimate state interests in environmental conservation and does not, on its face, "den[y] an owner economically viable use of his land." *Agins*, 447 U.S. at 260; *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 (1928).



troversy was not yet "appropriate for judicial determination." Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937) (per Hughes, C.J.).

Finally, although the judgment below may be upheld on prudential ripeness grounds, the lower courts' suggestion that petitioner may ripen her takings claim only by actually applying for approval of the transfer of her TDRs, see J.A. 153, 160-161, would, in our view, erect too rigid a requirement. In the takings context, the ripeness inquiry focuses on solidifying the economic uses toward which regulated property may be put, and on identifying a measurable impact of regulation on the value of the claimant's property rights. Thus, as we have indicated, if petitioner alleged—and, ultimately, demonstrated—that she had made good faith efforts to locate a buyer for her TDRs, but had not been successful, then her claim would be ripe (both constitutionally and prudentially), notwithstanding her failure to apply to transfer her TDRs.[15]

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[15] Such a showing would not, however, be dispositive of her substantive takings claim. Petitioner's unsuccessful attempt to sell her TDRs for a price that she deemed acceptable would be one factor in determining whether her property rights retained meaningful market value.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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